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In The

Supreme Court of the United States

October Term, 1990

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS OF CALIFORNIA, INC., INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC.,

Petitioners,

v.

BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

David M. Liberman
2049 Century Park East
Suite 3160
Los Angeles, California 90067
(213) 277-9288

KLIMEK LAW BRIEF SERVICE, (213) 837-9713

QUESTIONS PRESENTED

1. Whether, consistent with the Religion Clauses of the First Amendment, the State of California may impose a sales and/or use tax on the distribution of religious literature by a church organization where: (1) the literature contains the fundamental teachings and beliefs of the religion; (2) the literature is distributed in furtherance of a basic tenet of the religion; (3) the literature is distributed for donations only; (4) imposition of the tax burdens the distribution of the literature and violates a core belief of the religion; and (5) the funds received are used exclusively to pay the cost of the literature and to support religious programs.

2. Whether a taxpayer's due process rights are violated by an administrative requirement that a claim for refund be filed following each payment made in a governmentally approved installment plan, where the taxpayer objected to imposition and payment of the full amount of the tax and sought a refund of the tax throughout the administrative proceedings and prior to the first payment.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

The International Society for Krishna Consciousness of California, Inc. and International Society for Krishna Consciousness, Inc., petition for a writ of certiorari to review the judgment of the Court of Appeal of the State of California, Second Appellate District, in this case.

OPINIONS BELOW

The unpublished order of the Supreme Court of California denying a petition for review is set forth at App. 1. The unreported opinion of the Court of Appeal is set forth at App. 2.

JURISDICTION

The judgment of the Court of Appeal was entered on July 5, 1990. A timely petition for review was denied by the California Supreme Court on September 26, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." The Fourteenth Amendment provides, in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT

1. Petitioners, International Society for Krishna Consciousness, Inc. (ISKCON Inc.), a nonprofit New York corporation, and International Society for Krishna Consciousness of California, Inc. (ISKCON of California), a California nonprofit corporation, are the successive religious organizations for the Krishna Consciousness community in Los Angeles, California.[1] ISKCON was formed in 1966 by His Divine Grace A.C. Bhaktivedanta Swami Prabhupada, (Srila Prabhupada), a noted scholar and spiritual teacher who translated and wrote over 100 books, including a new translation of the *Bhagavad-gita*, the 25-volume *Srimad Bhagavatam*, 17 volumes of *Sri Caitanya Caritamrta*, and numerous other religious publications. CT 95.

In accordance with the central importance of scripture in the religion, Srila Prabhupada instructed his disciples to disseminate the written teachings as widely as possible. Thus, devotees are required to venture into public fora for the purposes of chanting the names of God, proselytizing members of the public, distributing religious literature, and soliciting funds to support the religion. Known in the Sanskrit language as "sankirtan," this activity lies at the core of Krishna Consciousness and is its very lifeblood.[2]

In accordance with the precepts of the religion, no fixed price is indicated on the books which are distributed in the course of sankirtan. Rather, voluntary contributions are solicited from the public, and, while devotees may seek con-

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[1] ISKCON Inc. was the corporate entity from 1973 to December 31, 1975. It was succeeded by ISKCON of California, which incorporated on January 1, 1976. CT 95-96. Neither corporation has any parent nor subsidiaries.

[2] *See, e.g., Int'l Soc'y for Krishna Consciousness v. Barber*, 650 F.2d 430, 442-43 (2d Cir. 1981).

tributions in excess of the cost of the books distributed, the amount of the donation is determined solely by the donor. CT 98-99. All proceeds from sankirtan are used for religious purposes, including the publishing costs of the books. CT 99.

In order to facilitate sankirtan, the Bhaktivedanta Book Trust (BBT), an unincorporated association, was formed to publish and distribute Krishna conscious literature. Originally, the BBT was affiliated with ISKCON Inc., and was located in the New York City temple. Later, the BBT moved to Los Angeles where it became part of the temple there. In January, 1976, ISKCON of California assumed corporate responsibility for the assets and operations of the Los Angeles temple and the BBT. CT 95-96.

During the period at issue, the BBT did not actually print books. Rather, it prepared manuscripts written by Srila Prabhupada, wrote additional original materials, translated works into other languages, arranged for original art works to be prepared and included in the books, and converted manuscripts into photographic plates. CT 96. It then contracted to have books printed by out-of-state printers, and once printed, the books were shipped to the BBT warehouse in Los Angeles. A large portion of the books were then transferred inter-divisionally by the BBT to the Los Angeles temple, and other books were sold to California temples in Laguna Beach, San Diego, and Berkeley, and to temples in other states. CT 96-97. The BBT kept records of the books shipped by invoice, title, and number. An arbitrary value was assigned to each publication, and the BBT billed the temples on this basis. CT 97.

ISKCON Inc. obtained a seller's permit on December 23, 1970. It filed tax returns with the Board of Equalization (Board) on a quarterly basis through December 31, 1975. ISKCON of California obtained a seller's permit effective January 1, 1976. Sales and use tax returns were subsequently filed on a quarterly basis. The amount in contro-

versy between ISKCON Inc. and the Board is for the period October 1, 1973, to December 31, 1975. The amount in controversy between ISKCON of California and the Board is for the period January 1, 1976, through December 31, 1979. CT 99-100.

2. On July 21, 1977, a Notice of Determination for $52,695.10 encompassing the period October 1, 1973 to December 31, 1975, was issued to ISKCON, Inc. by the Board. CT 136. On May 23, 1980, a Notice of Determination for the period January 1, 1976 to December 31, 1979, was issued to ISKCON of California for the amount of $298,341.73. CT 138. Following the exhaustion of various administrative requirements, an oral hearing contesting the imposition of the tax was held on October 15, 1980, for both periods. As a result of the hearing, the Board reduced the amount of the respective taxes to $52,234.43 for ISKCON Inc., and $212,597.03 for ISKCON of California. CT 102.

The Board also ruled that Petitioners were liable for the full amount of the adjusted tax. Specifically, the Board found that the inter-divisional transfer of books from the BBT to the Los Angeles temple were gifts in exchange for a donation, and assessed a *use* tax calculated on the basis of cost to Petitioners of the books transferred. The Board further ruled that the books transferred by the BBT to other California temples were sold, and assessed a *sales* tax on that transaction based upon the value assigned by the BBT at the time of transfer.[3]

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[3] The Board also sustained the tax as applied to devotional paraphernalia such as recorded tapes of philosophical lectures, photographs of Petitioners' religious icons, religious art works, prayer beads, and musical instruments which were either sold or given to the public or transferred between corporate departments. Petitioners contest the taxability of these items, which, like relgious books, are central to the practice of their religion.

3. Following a trial on stipulated facts and written and oral arguments in December, 1986, the trial court ruled that Petitioners had filed a timely claim for refund for $50,500.00 of the tax, but not for the balance of $240,796.37, and were not entitled to a refund of that amount. On the constitutional merits, the court held that the sales tax was invalid under the authority of *Institute in Basic Youth Conflicts v. Bd. of Equalization*, 166 Cal.App.3d 1093, 213 Cal. Rptr. 98 (1985). However, the Court also found that the use tax was not invalid under *Basic Youth Conflicts*, and Petitioners were thus not entitled to a refund of $240,796.37, nor of their attorneys' fees. The court further held that to the extent that *Basic Youth Conflicts* was not controlling, *Minneapolis Star & Tribune Co. v. Comm'r of Revenue*, 467 U.S. 575 (1983), empowered the State to impose a broadly based sales tax on religious books. CT 365.

4. On appeal, Petitioners argued that the California tax, as applied to the noncommercial distribution of religious literature distributed and paid for by voluntary contributions, violated both the Free Exercise and Establishment Clauses of the First Amendment. Specifically, Petitioners contended that the tax was directly applied to, and substantially burdened, a core religious belief and practice of Krishna Consciousness, and that the Board had failed to articulate, much less support, a compelling state interest sufficient to justify the tax. Petitioners also argued that the tax placed an unequal burden on minority religious organizations such as ISKCON, and excessively entangled the state with religion.

In an unpublished opinion, the court of appeal held that the tax was not imposed, either directly or indirectly, on a religious sacrament, and the tax therefore violated neither the state nor federal constitutions. The court also affirmed the trial court ruling that Petitioners had failed to file a timely claim for refund as to the $240,796.37 portion of the tax.

REASONS FOR GRANTING THE PETITION

In recent years, the constitutionality of state sales and use taxes, as applied to core religious practices, has been vigorously contested in both the state and federal courts. For the most part, these cases have been limited to the *sale* of religious literature for a fixed price. This case, however, entails the California sales and use tax as applied to religious literature which is distributed and paid for exclusively from funds raised through voluntary contributions. It is thus markedly distinct from the issues raised in *Jimmy Swaggart Ministries v. Bd. of Equalization*, 110 S.Ct. 688 (1990) (No. 88-1374), and should be evaluated independently of that decision.

This case also raises the question of whether the free exercise of religion guaranteed by the First Amendment "require[s] the government, in the absence of a sufficiently compelling need, to grant exemptions from legal duties that conflict with religious obligations? Or does this freedom guarantee only that religious beliefs will be governed by equal laws, without discrimination or preference?" McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Har. L. Rev. 1410, 1411 (1990) [hereinafter *Origins*]. Petitioners submit that recent decisions of this Court suggesting that religious exercise no longer occupies a "preferred position" in the pantheon of constitutional rights, but is instead relegated to the realm of secular rights and restrictions, undermines the purpose and protection of the Free Exercise Clause as envisioned by its framers, and seriously impairs the ability of minority religions such as ISKCON to carry out their fundamental religious missions.

Consequently, Petitioners request this Court to grant their petition in order to clarify these important issues.

I. AN EXEMPTION FROM THE CALIFORNIA SALES AND USE TAX FOR THE NONCOMMERCIAL PUBLICATION AND DISTRIBUTION OF RELIGIOUS LITERATURE IS REQUIRED UNDER THE FREE EXERCISE CLAUSE.

A. Origins Of The Free Exercise Clause.

The Free Exercise Clause of the First Amendment requires that the distribution of religious literature to the public be free of taxes, including the sales and use taxes imposed by California. The dissemination of scripture is speech, but the protection to be afforded it must be greater than that given other forms of speech because frequently it is *more* than speech. Many believers find in scripture power beyond its words, and in disseminating it, are worshipping God. The free exercise of religion, therefore, is given explicit protection in the First Amendment because "religious liberty is one of the most fundamental and important values in American life." Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development Part I. The Religious Liberty Guarantee*, 80 Har. L. Rev. 1381, 1385 (1967). Indeed,

> religion . . . is a highly personal matter and involves a man's loyalty to God as his highest good and the duties arising from this relationship. It defines an area of spiritual autonomy which is withdrawn from the reach of civil authority. . . . It presupposes freedom and voluntary adherence and cannot be coerced. . . . Christian theologians recognize . . . a basic interior freedom . . . that can be described only in spiritual terms and which by its nature is incapable of limitation or circumscription by the state.

P. Kauper, *Religion and the Constitution* 22 (1964).

Religious liberty, therefore, was not only the primary guiding force of life in the early colonies, *see, e.g.*, H. May, *The Enlightenment in America* (1976), but was the central

premise in the colonial concept of a limited government as well. Thus, authoritative evidence

> suggests that the theoretical underpinning of the free exercise clause, best reflected in Madison's writings, is that the claims of the 'universal sovereign' precede the claims of civil society, both in time and in authority, and that when the people vested power in the government over civil affairs, they necessarily reserved their unalienable right to the free exercise of religion, in accordance with the dictates of conscience. Under this understanding, the right of free exercise is defined in the first instance not by the nature and scope of the laws, but by the nature and scope of religious duty.

Origins, 103 Har. L. Rev. at 1512.

The principle of religious liberty as measured against the notion of a limited government is fully cognizable in the history of tax exemption for religious institutions. The exemption from taxation of churches, for example, "is based on a European tradition going back to the fourth century when the Emperor Constantine the Great, after his conversion, gave the Church this privilege" A. Stokes and L. Pfeffer, *Church and State in the United States* 546 (1965) [hereinafter *Church and State*], and was based upon the doctrine that church property "ceased to be under human control when it was devoted to God." Stimson, *The Exemption of Property from Taxation in the United States*, 18 Minn. L. Rev. 411, 416 (1934) [hereinafter *Exemption*].

Thus, the widespread colonial practice of exempting religious institutions from all forms of taxation was grounded on the recognition that

> [i]f churches were to operate in a free market environment, a prerequisite was that churches have independence from government control, not just independence from government support. If

> churches were to draw upon their own resources and pursue their calling as they understood it, the government should not unduly impede those efforts. To have voluntaristic churches meant to be free of both government help and hindrance.

Esbeck, *Establishment Clause Limits on Governmental Interferences with Religious Organizations*, 41 Wash. & Lee L. Rev. 347, 360 (1984).

The tax exemption which Petitioners seek is thus fully consonant with the historical origins of the Free Exercise Clause of the First Amendment.

B. Application Of The Sales And Use Tax To The Dissemination Of Religious Books Creates A Direct And Substantial Burden On The Free Exercise of Religion.

Central to the court of appeal's decision is its belief that the sales and use tax places no burden on the free exercise of Petitioners' religion. App. 20. This contention is flawed. The formidable power of tax laws and policies to shape and inform the exercise of religious life is well documented. Federal tax laws, for example, "induce new religious movements to become formally organized at a very early date and thus may make them visible sooner than is true of similar groups in Europe. As a result, the primary regulators of our religious economy are state and federal tax collectors." Stark, *How New Religions Succeed: A Theoretical Model*, in The Future of New Religious Movements 19 (D. Bromley and P. Hammond eds. 1987).

Religious organizations are thus particularly vulnerable to any governmental imposition on their missionary and financial activities. "Because religious organizations need money (as well as donated time and services) for their activities, the scope of those activities will be influenced by governmental actions that have the effect of either taxing or subsidizing religion generally or particular religious organi-

zations." McConnell & Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. Chi. L. Rev. 1, 5 (1989) [hereinafter *Religious Freedom*].

This Court's historic concern that some religious movements might collapse under the weight of government regulation rather than on the basis of the "zeal of [their] adherents, and the appeal of [their] dogma" *Zorach v. Clausen*, 348 U.S. 306, 313 (1952) is thus more than a "figure of speech." *McCollum v. Bd. of Education*, 333 U.S. 203, 247 (1948). As noted above, Krishna Consciousness requires its followers to perform the religious ritual of sankirtan, during which religious books are distributed and funds are received. However, there is no *quid pro quo* between the books distributed and the money received. Rather, such funds represent a voluntary donation by the contributor which can, and is, used for a variety of religious purposes, including payment of the cost of the books. Because of the religious precepts controlling the manner in which sankirtan is performed, it is not possible to increase the amount of the donation, or "sell" the books for a fixed price, although an additional 6.5% "cost" is imposed by the tax. Consequently, the result of the tax is a significant decrease in the number of books distributed, and a potentially critical reduction in the funds available to pay the printer.

The Free Exercise Clause, however, which envisions the protection, not suppression, of religious pluralism, was meant to have the opposite effect.

> By taking into account the special costs that practitioners of minority faiths incur (minority faiths because laws generally reflect majority preferences—*e.g.*, for which day businesses shall be required to close), [the Free Exercise] cases reduce the cost of practicing such faiths and by doing so tend to increase the variety of faiths, which in turn enables more people to find a set of religious practices and beliefs they can share.

Religious Freedom, 56 U. Chi. L. Rev. at 55 (footnote omitted).

Thus, "if the state, through pecuniary or non-pecuniary exactions, makes it more costly to adhere to one creed than another (including the creed of nonbelief), this may cause a shift in religious affiliation." *Id.* at 5.

For this and other reasons such as separation of church and state, religious property, including missionary literature,

> must remain tax free. To lay a tax on churches would enhance the power of the State; it would enable the State to control the churches and would certainly be contrary to the basic principle of church-state separation. The State that has ever-increasing need of financial resources might jeopardize the church's ability to operate as an effective agency. *Moreover, church taxation would enable only wealthy churches to subsist.*

Walther, *Tax Exemption and the Church*, 57 Liberty 10, 13, (1962) (emphasis in original).

The California sales and use tax thus interferes with the delicate balance of religious pluralism by making it excessively costly for minority religious organizations such as Krishna Consciousness to carry out their fundamental religious mission. As shown above, the tax has the most severe impact on religious organizations that are spiritually compelled to distribute religious books for voluntary donations as their principal means of worship and proselytization. Consequently, the Free Exercise Clause is fully applicable to the circumstances of this case.[4]

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[4] Moreover, "[t]he disparity in income between large churches and small ones should not be forgotten here. A tax on large reli-

(Continued on following page)

C. The Courts Below Erred In Not Requiring The Board To Articulate And Support A Compelling Governmental Interest Sufficient To Override The Free Exercise Of Petitioners' Religion.

It having been shown that the original intent of the First Amendment envisions religious exemptions from neutral laws of general application, and that a substantial burden has been placed upon the free exercise of the Krishna Consciousness religion, it follows that the Board must be required to demonstrate that application of the sales and use tax to the noncommercial distribution of religious books for a voluntary donation is the "least restrictive means of achieving some compelling state interest." *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981). "It is basic that no showing merely of a rational relationship to a colorable state interest would suffice." *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). Rather, "only those interests of the highest order and not those otherwise served can overbalance legitimate claims to the free exercise of religion." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

Religious organizations have historically enjoyed an exemption from the tax burdens placed upon secular institutions for sound reasons. "[T]he United States 'has long recognized the need to encourage, not handicap, those instrumentalities which foster and inculcate the principles of mercy, religion, and charity,' and which through their ethical teachings are a great asset 'in the field of public order.' "

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gious institutions would not be as detrimental to them as it would be to a small institution. If you take food away from a rich man and a poor man, the rich man will only be hungry, but the poor man may die." Hageman, *An Examination of Religious Tax Exemption Policy Under Section 501(c)(3) Internal Revenue Code*, 17 Val. U.L. Rev. 405, 433 (1983).

Church and State at 547-48. Indeed, "[t]he influence of churches upon the character of various members of society is said to be sufficiently desirable to warrant the removal of church property from the tax roll. Religious societies devote their efforts and their property to the moral uplifting of society, in most cases seeking no pecuniary profit for themselves." *Exemption*, 18 Minn. L. Rev. 422. This policy, moreover, is not limited to real estate owned by churches, but extends to the income of religious organizations, *see, e.g.*, H.R. Rep. No. 1860, 75th Cong., 3d Sess. 19 (1939), as well as to sacred literature. *See* Kauper, *The Constitutionality of Tax Exemptions for Religious Activities*, in The Wall Between Church and State 111-12 (D. Oaks ed. 1963).

Consequently, few, if any, state interests are sufficiently compelling to justify the substantial infringement of religious liberty created by the tax. Generally, the free exercise of religion may be restricted "only to prevent grave and immediate danger to interests which the state may lawfully protect." *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624, 629 (1943). "The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order." *Sherbert*, 374 U.S. at 403; *Yoder*, 406 U.S. at 230.

On the other hand, when such paramount interests are not at stake, the Court has required that religiously grounded exemptions be granted to otherwise neutral laws of general application. Thus, in *Sherbert* the State's interest in preventing fraudulent unemployment claims was held insufficient to override a Seventh-day Adventist stricture prohibiting work on Saturday. Similarly, in *Yoder* the State's interest in compulsory universal education, "however highly we rank it" 406 U.S. at 214, was found insufficient to abridge a conviction of the Old Order Amish prohibiting public high school education for its young people. The Free Exercise Clause, therefore, "not only permits states to give exemptions to aid religion, but sometimes, as the Court's decisions in *Yoder* and *Sherbert* demonstrate, the rule requires states to

give such exemptions." Choper, *The Free Exercise Clause: A Structural Overview and an Appraisal of Recent Developments*, 27 Wm. & Mary L. Rev. 943, 947 (1986). Such is certainly the case with respect to a state excise tax imposed directly on religious literature.

In addition to articulating a compelling state interest, the Board should have also been required to demonstrate that the revenues generated by imposing a direct tax on the dissemination of religious literature were essential to its fiscal viability. In *Yoder*, for example, the State contended that its interest in its system of compulsory education was so compelling that even the established religious practices of the Amish had to give way. 406 U.S. at 221. The Court, however, refused to accept this unsupported assertion, and instead placed the burden of proof of the existence of such an interest squarely on the State. Similarly, in *Sherbert* the Court emphasized that there was "no *proof* whatever to warrant [the State's] fears of malingering or deceit as those which the respondents now advance." 374 U.S. at 407 (emphasis added).[5]

Courts, therefore, may not simply accept without question theoretical assertions that the State has a compelling interest in its excise tax system. Rather, assuming that it may impose a direct tax on religious literature—a proposition which Petitioner's vigorously contest—the Board must be required to show that such tax revenues are *critical* to its fiscal viability.

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[5] *See also Goldman v. Weinberger*, 475 U.S. 503, 530 (1986) (O'Connor, J., dissenting) ("government must show that the opposing interest it asserts is of especial importance . . . [and] that the interest asserted will in fact be substantially harmed").

D. The Board Has Also Failed To Demonstrate That Taxing The Dissemination Of Religious Literature Is The Least Restrictive Means Of Achieving Any Compelling Interest Found To Exist.

Along the same lines, the Board should have been required to show that the minimal diminution in revenues which would be created by exempting religious literatures from the tax could not be recovered from other sources. For example, the federal government imposes a tax, with certain exceptions, on charitable and religious organizations which derive income from "any trade or business the conduct of which is not substantially related . . . to the exercise or performance by such organization of its charitable, educational, or other purpose or function." 26 U.S.C.A. § 512(a) (West 1988). Petitioners suggest that this is the proper standard for taxing religious organizations, as "a line between non-profit and the commercial activities of churches treats churches more neutrally than would other lines (for example, religious-nonreligious)." *Religious Freedom*, 56 U. Chi. L. Rev. at 13.

The California sales and use tax scheme, unfortunately, makes no such distinction between the commercial and noncommercial activities of religious organizations. Consequently, certiorari should be granted in order to make clear that the noncommercial distribution of religious literature for a voluntary donation is "not [a] proper source[] of taxation." *Jones v. City of Opelika*, 316 U.S. 584, 620 (1942) (Murphy, J., dissenting), *majority opinion vacated and dissenting opinion adopted per curium*, 319 U.S. 103 (1943). Indeed, "the State's interest [in] obtaining revenue . . . [can] be satisfied by taxing any variety of sources, [and does] not justify a levy imposed upon an activity which in the light of history could reasonably be viewed as Sacramental." *McGowan v. Maryland*, 366 U.S. 420, 462-63 (1961) (separate opinion of Frankfurter, J., joined by Harland, J.). Rather, as discussed above, the state's interest in obtaining revenue may be satisfied by the less restrictive alternative of taxing commercial or

"nonreligious sources." *Braunfeld v. Brown*, 366 U.S. 599, 607 n. 4 (1961).

II. THE TAX VIOLATES THE ESTABLISHMENT CLAUSE BY EXCESSIVELY ENTANGLING THE STATE WITH RELIGION.

In order to survive constitutional scrutiny under the Establishment Clause, a challenged governmental action must (1) be clearly secular in purpose; (2) have a primary effect which neither advances nor inhibits religion; and (3) not result in excessive entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). If governmental action violates any *one* of these three principles, it must be invalidated. *Stone v. Graham*, 449 U.S. 39, 40-41 (1980).

Here, the tax violates the third prong of *Lemon* by excessively entangling the state with religion. The court of appeal found that the "administrative burdens created by the imposition of these neutral tax laws do not involve the invasive levels of contact which require them to be invalidated" App. 24, and that imposition of the tax "does not require the state to inquire into the content of materials or the motives for transfer." *Id.* This finding, however, misses the point.

In *Walz v. Tax Commission*, 397 U.S. 664 (1970), Chief Justice Burger aptly noted that "[f]ew concepts are more deeply embedded in the fabric of our national life" than tax exemptions for religious organizations. *Id.* at 676. Accordingly, the Court found that tax exemptions would reduce, rather than increase, government entanglement with religion. The Court stated:

> The test is inescapably one of degree. Either course, taxation of churches or exemptions, occasions some degree of involvement with religion. Elimination of exemptions would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the

> direct confrontations and conflicts that follow in the train of those legal processes.

Id. at 674.

This is exactly the statutory scheme at issue here. Under California law, the Board may require any person or entity subject to the tax to "place with it such security as the board may determine," Cal. Rev. & Tax. Code § 6701 (West 1987), freeze bank accounts in order to collect unpaid taxes, *id.* § 6703 (West Supp. 1990), procure a writ of attachment against church assets, *id.* § 6713 (West 1987), record tax liens against church assets, *id.* § 6738, and seize and sell church assets to satisfy unpaid taxes. *Id.* § 6796.

Clearly, the California Code goes far beyond mere regulation, and implicates the precise concerns raised in *Walz*. Thus, the tax should be invalidated under the Establishment Clause.

III. CERTIORARI SHOULD BE GRANTED IN ORDER TO CLARIFY RECENT DECISIONS OF THIS COURT INVOLVING STATE EXCISE TAXES AND THE FREE EXERCISE OF RELIGION.

In upholding the constitutionality of the tax, the court of appeal understandably found the Court's recent decision in *Swaggart* to be controlling. In so doing, however, the court overlooked several major distinctions between *Swaggart* and the present case. Most obvious, of course, is that *Swaggart* entailed a tax on the commercial sale of religious literature for a fixed price, while this case involves the gratuitous distribution of literature for a voluntary donation. Additionally, *Swaggart* noted that its outcome may have been different had application of the tax engendered violation of a religious belief, or the "chok[ing] off of an adherent's religious practices." 110 S.Ct. at 667. Yet, this is precisely the situation here.

First, payment of the tax does in fact violate a central religious belief of the Krishna Consciousness religion. In one

of Petitioners' primary scriptures, for example, it is explained as follows:

> The king or government may levy taxes upon the citizens in various ways—by revenue duties, customs duties, realization of fines, and so on—provided the king is able to give full protection to his subjects to assure the security of their life and property. Unless he is able to give protection, he cannot levy taxes. However, a king must not levy any tax upon the *brahmanas* and the Vaisnavas fully engaged in Krishna consciousness.

A. Bhaktivedanta, *Srimad Bhagavatam* 7th Canto, 11th Chapter, verse 14, p.37 (purport). Thus, payment of the tax violates a central belief of Petitioners' religion.

Imposition of the tax also threatens to "choke off" the exercise of sankirtan. Unlike the circumstances of *Swaggart*, where it was possible to pass along the cost of the tax to the consumer in the same way as any other retail sale, the tax here cannot be passed along and will come directly out of the donation received. Indeed, while the court of appeal suggests that the tax will not burden the practice of sankirtan, it misperceives the fact that regardless of where the tax is actually applied, the book will ultimately be paid for by money raised from voluntary donations. Moreover, the tax must be paid even if Petitioners receive no money whatsoever for their religious literature, which is frequently the case. CT 6-7.

Nor is it significant that the Board applies the tax to the publishing or "wholesale" aspect of sankirtan, as opposed to the "retail" public contact aspect. The entire process of producing literature is a sacred, indispensable feature of the religion which must ultimately be paid for from voluntary donations. It is not the technical application of the tax, therefore, which determines whether Petitioners' religion has been abridged, but rather the impact of the tax.

Consequently, it having been shown that the tax does in fact burden Petitioners' religious exercise, the Board should have been required to demonstrate that application of the tax to sankirtan is the least restrictive means of achieving a compelling state interest. This requirement, moreover, is not eliminated by *Employment Division, Dept. of Human Resources of Oregon v. Smith*, 110 S.Ct. 1595 (1990) (No. 88-1213) which, for two primary reasons, is clearly distinguishable from the instant case. First, as recognized by the court of appeal, App. 20, n.11, *Smith* involved a request for exemption from "an across-the-board *criminal* prohibition on a particular form of conduct" which implicated "the government's ability to enforce generally applicable prohibition of *socially harmful conduct*." 110 S.Ct. at 1603 (emphasis added). Here, in contrast, no such paramount state interests are present to justify application of the tax to Petitioners' religious expression.

More importantly, however, *Smith* emphasized that the compelling state interest test would apply where the Free Exercise Clause was combined "with other constitutional protections, such as freedom of speech and of the press." 110 S.Ct. at 1601. The present case, of course, presents precisely "such a hybrid situation" *id.* at 1602; *see Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 647 (1981), which requires application of the test.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

David M. Liberman
2049 Century Park East
Suite 3160
Los Angeles, California 90067
(213) 277-9288

December 21, 1990

APPENDIX 1

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

Second Appellate District, Division Five,
No. B026332 S017010

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

FILED SEP 26 1990

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS Et. Al., Appellants

v.

BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA Et. Al., Respondents.

Appellants's petition for review DENIED

BROUSSARD
Acting Chief Justice

APPENDIX 2

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, et al.,	2nd Civil No B026332 (Super. Ct. No. C360177)
Plaintiffs and Appellants,	
v.	FILED JUL 5 1990
BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, et al.,	
Defendant and Respondent.	

APPEAL from a judgment of the Superior Court of Los Angeles County. Philip Saeta, Judge. Affirmed.

Fleishman, Fisher & Moest, Barry A. Fisher, Robert C. Moest, David M. Liberman for Plaintiffs and Appellants.

John K. Van de Kamp, Attorney General, Edmond B. Mamer, Richard E. Nielsen, Deputy Attorneys General, for Plaintiff and Respondent.

Plaintiffs, International Society for Krishna Consciousness, Inc. (ISKCON) and International Society for Krishna Consciousness of California, Inc. (ISKCON of California) appeal from a judgment denying them a refund of approximately $300,000 in sales and use taxes paid under protest for religious literature, religious objects, and other goods used and distributed in the course of practicing their religious beliefs during the general time period of October 1973 through December, 1979. Plaintiffs contend that the application of such taxes to religious organizations is unconstitutional because it violates the free exercise and establishment clauses of the state and federal Constitutions. Because we find that no tax is imposed on a religious sacrament either directly or indirectly, there is no violation of the federal or state constitutions.

FACTS

Plaintiffs are the successive corporate entities related to a religious community in Los Angeles which is commonly known as the Krishna Consciousness community. ISKCON common was a non-profit New York corporation which was the corporate entity for that community from 1973 to December 31, 1975. When ISKCON of California, a non-profit corporation, was incorporated effective January 1, 1976, it succeeded ISKCON as the corporate entity for the community.

The Krishna Consciousness community surrounds the Krishna Consciousness temple for the Los Angeles area. The community served as a religious and monastic teaching center for approximately 250 devotees of the Krishna Consciousness religion. During the years at issue in this case, the temple and surrounding area provided not only a place of worship for a large number of individuals, but also served as headquarters for the book publishing and distribution activities for the entire Krishna Consciousness movement in the United States and elsewhere.

The founder of the modern Krishna Consciousness movement was "His Divine Grace A.C. Bkahtivedanta [sic] Swami Prabhupada" (Prabhupada), an Indian national who immigrated to the United States in 1966. Prabhupada, a noted scholar, wrote more than 100 books, including a new translation of Bkagavad-Gita [sic], with commentary, perhaps the central scripture for the movement; the 25-volume Srimad Bkagavatam [sic]; 17 volumes of Sri Caitanya Caritamrta and a number of other religious works. Prabhupada instructed his followers to disseminate the printed word of the Krishna Consciousness religion as widely as possible to its followers and to the general public.

The religion requires its members to perform a sacrament, called "Sankirtan", which involves going into public places, approaching the public, giving them Krishna Consciousness literature, and soliciting donations. No sacrament is more central to the religious beliefs and practices of devotees than the widest possible dissemination of religious books and magazines glorifying their deity. Disseminating such materials is a religious act, mandated by Krishna Consciousness scriptures as interpreted by Prabhupada and in the sincere belief of the devotees. As will be noted, this case does not involve an effort to tax directly or indirectly the sacrament of Sankirtan.

During the years in question, in the course of distributing books and periodicals, ISKCON devotees solicited contributions from the public. There was no fixed price indicated on the materials disseminated, but the members of the public were asked to make a voluntary contribution. Devotees attempted to obtain contributions in excess of the cost of the materials disseminated but the amount ultimately contributed was determined by the members of the public. All proceeds of Sankirtan are used for religious purposes. California devotees also solicited contributions from the public without furnishing literature. Solicitations received from the public are used to pay the fixed costs of operating the Los Angeles Temple and the Krishna Consciousness community.

Any excess over and above the amount necessary to operate the temple and community was used to pay the costs of printing books.

In accordance with the religious requirement of dissemination of religious scriptures, followers of the religion formed an unincorporated entity known as the Bhaktivedanta Book Trust (BBT) to publish and distribute Krishna Consciousness books and literature. Originally, BBT operated in New York City under the auspices of ISKCON. Later, BBT moved to Los Angeles and operated as part of the Los Angeles temple. In January 1976, ISKCON of California assumed corporate responsibility for the assets and operations of the Los Angeles temple, including the BBT.

During the years at issue in this case, BBT did not engage in the physical printing of books and periodicals. It prepared manuscripts written by Prabhupada, wrote original material, solicited and received manuscripts, translated material into other languages and created original religious paintings. BBT negotiated contracts with printers outside of California. Printed material was then shipped back to Los Angeles for distribution to the Los Angeles temple, to other temples in California (in Berkeley, Laguna Hills and San Diego) and others were shipped out of state. BBT kept records of the books transferred consisting of invoices reflecting books shipped by title and number. A value was assigned to each publication and BBT billed the entities to which the books had been shipped according to the values assigned.

Unincorporated divisions of BBT were ISKCON Press, BBT Mail Order Department, Golden Avatar Productions and Spiritual Sky Scented Products. From October 1, 1973, until December 31, 1975, the Spiritual Sky Incense Company was operated as part of ISKCON but was later established as a separate entity.

ISKCON registered with the Board and obtained a seller's permit on December 23, 1970, and filed sales and

use tax returns with the Board on a quarterly basis through December 31, 1975. ISKCON of California registered with the Board on July 30, 1976, and obtained a seller's permit effective January 1, 1976, and sales and use tax returns were subsequently filed on a quarterly basis. The amounts in controversy between ISKCON and the Board are for the period October 1, 1973, to December 31, 1975. The amounts in controversy between ISKCON of California and the Board are for the period January 1, 1976, through December 31, 1979.

In July 1977, following a field audit, the Board sent a Notice of Determination to ISKCON of an amount owing of $52,645.10 for the period from October 1, 1973, through December 31, 1975. The Notice specified that a petition for redetermination had to be filed by August 21, 1977. On September 9, 1977, ISKCON filed with the Board a document entitled "Petition for Redetermination" relating to the July 1977 Notice of Determination. Although the petition was untimely, the Board notified ISKCON that it would consider the petition as a protest of a final deficiency determination and scheduled a preliminary hearing. On October 5, 1979, following the preliminary hearing and the issuance of a decision and recommendation on the late protests, ISKCON requested an oral hearing which took place on October 15, 1980.

In May 1980, following a field audit, the Board sent a Notice of Determination to ISKCON of California for the period January 1, 1976, to December 31, 1979, for $298,341.73 for taxes owed. The Notice indicated that a petition for redetermination had to be filed by June 23, 1980. ISKCON mailed a document entitled "Petition for Reassessment" to the Board on July 1, 1980. The Board corresponded with ISKCON of California indicating that the petition was untimely and no hearing would be granted. A second document entitled "Petition for Reassessment and Claim for Refund" was mailed to the Board regarding the 1976-1979 period in September 1980 and requested a

$28,000 refund. On October 9, 1980, a notice of decision and recommendation of the hearing officer was mailed to ISKCON of California pertaining to the late protest.

At the October 15, 1980, hearing, plaintiffs submitted a Motion for Consolidation and Amendment to their Petition for Reassessment filed September 1980, seeking to consolidate the cases for the 1973-1975 audit and the 1976-1979 audit. This document sought specifically to amend the claim for refund from $28,000 to $50,500, which ISKCON of California had paid prior to the hearing. After the hearing, the Board issued and mailed to ISKCON and ISKCON of California amended statements of account, for the amount of $52,234.43 from ISKCON for the 1973-1975 period and the amount of $212,597.03 from ISKCON of California for the 1976-1979 period.

The Board ruled that the books and pamphlets distributed by plaintiffs' devotees from the Los Angeles Temple in California were in reality gifts in exchange for donations and subject to a use tax calculated on the basis of cost to the plaintiffs of the books distributed. The books and pamphlets that were transferred to the other temples in California were sold and therefore plaintiffs were required to a pay a sales tax on the books based upon the invoice prices. No tax was imposed on the proceeds of donations resulting from the practice of Sankirtan. The Board's ruling also assessed taxes on other items including intermediate materials and artwork used in connection with the production of books and magazines, transcendental supplies, including beads, robes, music and lecture tapes, books, drums and incense supplied by BBT Mail Order to its other divisions, office equipment, and "munits" [sic] (molded figures of Krishna and other deities) which were either sold or given to the public or

transferred between divisions. Plaintiffs conceded that the tax was due on many of these items.[1]

Pursuant to the Board's ruling, plaintiffs paid the remaining amounts of $240,796.37, which was due, in installments during 1980 and 1981. No other claims for refund were filed concerning these payments. Plaintiffs brought suit for refund of the total amount paid pursuant to the ruling.

Following a trial on stipulated facts and written and oral arguments by counsel, the trial court ruled that plaintiffs had filed a timely claim for refund for $50,500.00 of the taxes paid, but had failed to file a claim for the balance of $240,796.37 and thus were not entitled to a refund of that amount. On the merits of plaintiffs' constitutional attacks, the court found that the use tax but not the sales tax may be constitutionally applied to distribution of plaintiffs' literature, citing *Institute in Basic Youth Conflicts, Inc. v. State Board of Equalization* (1985) 166 Cal.App.3d 1093, 1106. The court also decided that if it was not bound by *Institute*, then *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue* (1982) 460 U.S. 575, 586, was controlling and provided that sales tax may be constitutionally applied and plaintiffs would not be entitled to a refund.

The matters in dispute relate to the imposition of a use tax on books purchased out of state and distributed in California. The use tax was calculated based on the cost of the books and not on the amount of contributions. Also, the parties disagree about whether the books sold by ISKCON

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[1] Plaintiffs contend that they have not conceded the taxability of some of the items contained in the Board's ruling. However, plaintiffs have confined their arguments to the taxability of religious literature.

of California to other temples may be the subject of a sales tax.

DISCUSSION

1. Exhaustion of Administrative Remedies

a. Constitutional claims

The Board contends that plaintiffs have raised contentions at trial and on appeal that were not raised in the claim for refund and should be barred from doing so under the doctrine of exhaustion of administrative remedies. As a prerequisite for bringing an action for a tax refund, the taxpayer must first present a claim for refund to the Board. (§ 6932.)[2] Every claim shall state the specific grounds upon which the claim is founded. (§ 6904.) Issues not raised in the claim may not be raised in the suit; the suit may be brought only "on the grounds set forth in the claim." (§ 6933.) The claim for refund thus frames and restricts the issues for litigation. *(A & M Records, Inc. v. State Board of Equalization* (1988) 204 Cal.App.3d 358, 367.)

The Board argues that paragraph 9 of the "Petition for Reassessment" which was presented to the Board is insufficient to address the legal and factual contentions raised on appeal. Paragraph 9 provides: "Petitioner further alleges that the imposition of the tax violates both the United States and California Constitutions. The taxation of the activities of fulfilling religious requirements of Petitioner fall within the ambit of violation of the First Amendment on the establishment of religion clauses of the California and United States Constitutions in the same fashion as would the outright

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[2] Unless otherwise indicated, all statutory references are to the Revenue and Taxation Code.

prohibition of Petitioner's public activities." In addition to paragraph 9, plaintiffs asserted by amendment to the petition that "the 'Free Exercise of Religion' clause of the First Amendment [sic] prohibits the State of California from taxing that activity [Sankirten (sic)]" Clearly, the Board was presented with both establishment and free exercise clause issues at the administrative level.

The Board also argues that the plaintiffs' references to equal protection, discrimination and entanglement are precluded. These claims are without merit. First, as plaintiffs point out, they have not independently raised an equal protection or discrimination claim but have instead argued that the state has favored other religions over Krishna practices. The argument is restricted to establishment clause issues. Second, plaintiffs' entanglement argument is the third prong of the *Lemon v. Kurtzman* (1971) 403 U.S. 602, 612-613 tripartite test for determining whether the establishment clause is violated. The issue of whether there is " 'excessive government entanglement with religion' " *(ibid.)* falls within the ambit of the establishment clause cases raised before the Board. Therefore, plaintiffs' petition to the Board was broad enough to encompass the issues raised on appeal.

b. Refund

The parties also raise the issue of whether the trial court had jurisdiction over those amounts paid by the plaintiffs for which no claim for refund was filed. The trial court ruled that it would consider the merits of plaintiffs' claims for $50,500 which was paid prior to the October 15, 1980, hearing. The court held that it would not consider claims for the $240,796.37 which was paid during 1980 and 1981 since no claim had been filed concerning those payments.

Article XIII, section 32 of the California Constitution provides: "No legal or equitable process shall issue in any proceeding in any court against this State or any officer

thereof to prevent or enjoin the collection of any tax. *After payment* of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the Legislature." (Emphasis added.) The Legislature has determined that in order to file an action against the state to recover a use or sales tax that has been paid, a taxpayer must file a claim with the Board for a refund. (§§ 6932, 6901-6908; *A & M Records v. State Bd. of Equalization, supra,* 204 Cal.App.3d at p. 367.) Failure to file a claim within the relevant time period constitutes a waiver of any demand for overpayment. (§ 6905.) Therefore, although we conclude that defendant's assessment of sales and use taxes was constitutional, we find that the trial court correctly concluded that the failure to file a claim with the Board for the $240,796.37 paid during 1980 and 1981 bars recovery of that sum.

2. First Amendment

Plaintiffs contend that the sales and use taxes as applied to the distribution of religious books by the plaintiffs violates the free exercise and establishment clauses of the state and federal Constitutions. The First Amendment of the United States Constitution provides that Congress shall " 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof.' " The amendment applies to the states through the Fourteenth Amendment. (*Jimmy Swaggart Ministries v. Bd. of Equalization* (1990) ___U.S.___, 110 S.Ct. 688, 693.)[3]

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[3] At oral argument, plaintiffs' counsel argued that this court should consider the intention of the framers of the constitution in drafting the First Amendment. However, this issue was not raised in the briefs filed in this court. Therefore, the issue has been waived. (*Estate of Davis* (1940) 38 Cal.App.2d 579, 587.)

a. California's Sales and Use Taxes

California's Sales and Use Tax Law requires retailers to pay a sales tax "[f]or the privilege of selling tangible personal property at retail. . . ." (§ 6051.) A "sale" includes any transfer of title or possession of tangible personal property for a consideration. (§ 6006, subd. (a).) The measure of the tax is a percentage of the retailer's gross receipts from such sales in this state. (§ 6051.) In this case, the sales tax was imposed on sales from plaintiffs to various temples. No sales tax was imposed on the donations collected by plaintiffs' followers from the public.

The use tax is imposed "on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer . . . for storage, use, or other consumption" and is measured by the percentage of the sales price of the property. (§ 6201.) The use tax is imposed on the purchaser, however, it is generally collected by the retailer at the time of the sale. (§ 6202-6206.)[4] The use tax is complementary to the sales tax and any use of property in California is exempt from the use tax if the purchaser establishes that the gross receipts from the sale of the property to him were included in the measure of the sales tax. (§ 6401.) In a suit for a sales and use refund, the party seeking the refund has the burden of establishing that the tax assessment was in error. (§§ 6091, 6241; *Honeywell, Inc. v. State Board of Equalization* (1982) 128 Cal.App.3d 739, 744-745.) In this case, the use tax was imposed on books purchased outside of California but brought to this state for distribu-

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[4] Every retailer engaged in business in California and making sales of tangible personal property for taxable use in California is required to collect the tax from the purchaser. (Title 18, California Code of Reg. § 1684.)

tion to the public. The tax was calculated based on the cost of the books to plaintiffs.

b. Free Exercise Clause

Plaintiffs contend on appeal that the dissemination of printed or religious materials may not be subjected to sales or use taxes because it violates the free exercise clauses of the federal and state Constitutions. Plaintiffs' primary support in contention of this proposition is the United States Supreme Court decision in *Murdock v. Pennsylvania* (1943) 319 U.S. 105, 108-117, and *Institute in Basic Youth Conflicts, Inc. v. State Bd. of Equalization, supra,* 166 Cal.App.3d at pp. 1098-1106.[5] In *Murdock*, Jehovah's Witnesses were convicted of violating a city ordinance that prohibited solicitation of goods without paying a flat fee. The court reversed the convictions emphasizing that the tax was "a license tax—a flat tax imposed on the exercise of a privilege granted by the Bill of Rights." *(Murdock V. Pennsylvania, supra,* 319 U.S. at p. 113.)

The decision in *Murdock* was recently distinguished by the Supreme Court in *Jimmy Swaggart Ministries v. Bd. of Equalization, supra,* 110 S.Ct. at p. 695. In *Swaggart,* the Supreme Court addressed the issue of whether California's sales and use tax could be constitutionally applied to the dis-

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[5] *Institute* held that the state could tax the use or consumption of religious materials that were sold at a seminar. (*Id.* at p. 1106.) However, the court held that the sale of the material could not be taxed because it was a tax imposed on a privilege guaranteed by the United States Constitution. *(Ibid.)* The viability of *Institute* as it relates to the sales tax question is highly questionable after the decision in *Jimmy Swaggart Ministries v. Bd. of Equalization, supra,* 110 S.Ct. at pp. 691-701, which upheld California's sales and use tax against a First Amendment challenge on the grounds that it violated the free exercise and establishment clauses.

tribution of religious materials under the free exercise clause and concluded that it could. (*Id.* at p. 693.) Plaintiffs contend in their letter brief that *Swaggart* is distinguishable from this case for three reasons: (1) there was no indication that the sale of religious materials was conducted in furtherance of a core belief or practice of the religion in contrast to this case where it has been stipulated that Sankirten [sic] lies at the core of the Krishna religion; (2) *Swaggart* involved the retail sale of religious books for a fixed price and plaintiffs' books are offered and a donation is given which is only incidental to the cost of the book; and (3) the taxes are invalid under the more expansive provisions of the California Constitution. Thus, plaintiffs argue that the sales and use tax as applied to them is unconstitutional. For the reasons stated below, we find that there is no violation of plaintiffs' religious freedom rights. No tax is imposed on the religious sacrament of Sankirtan.

In *Swaggart*, a religious organization, which was incorporated in Louisiana, sold a variety of religious materials by mail and at "evangelistic crusades" to California residents. (*Id.* at pp. 691-692.) The organization protested the imposition of the sales and use tax on the sale of its religious items on the grounds that it violated the free exercise clause of the First Amendment. (*Id.* at p. 693.) The organization described itself as " 'an evangelistic outreach for the worship of Almighty God.' " (*Id.* at p. 691.) The outreach was to be accomplished " 'by all available means . . . that presently exist or may be devised in the future to proclaim the good news of Jesus Christ.' " *(Ibid.)* The Board concluded that the organization was required to pay a sales tax on all sales made at crusades held in California and a use tax on all mail order sales to California residents. (*Id.* at p. 692.)

The Swaggart organization argued that pursuant to the decisions of *Murdock* and *Follett v. McCormick* (1944) 321 U.S.

573, 574,[6] the Board could not constitutionally impose a sales or use tax on the distribution of religious materials. In rejecting the organization's claim, the court noted that the year before in *Texas Monthly, Inc. v. Bullock* (1989) ___U.S.___, 109 S.Ct. 890, 901-903, a plurality of the court disapproved dictum in *Murdock* and *Follett* that could be read to absolutely bar states and the federal government from taxing the sale of religious or other publications.[7] The court also noted that a newspaper's argument, based on *Murdock* and *Follett*, that a generally applicable sales tax could not be applied to publications had been rejected in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, supra*, 460 U.S. at p. 587.[8] Owners of newspapers

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[6] In *Follett*, the court reversed the conviction of a Jehovah's Witness minister who was convicted of violating an ordinance that required all booksellers to pay a flat fee to sell books.

[7] In *Texas Monthly*, the court struck down a Texas statute that exempted religious publications from state sales taxes on the grounds that the exemption violated the Establishment Clause.

[8] In *Minneapolis Star v. Minnesota Comm'r of Rev., supra*, 460 U.S. at pp. 586, 587, fn. 9, the court stated: "Star Tribune insists that the premise of the State's argument—that a generally applicable sales tax would be constitutional—is incorrect, citing *Follett v. McCormick* [(1944) 321 U.S. 573], *Murdock v. Pennsylvania* [(1943) 319 U.S. 105], and *Jones v. Opelika* [(1943) 319 U.S. 103]. We think that *Breard v. Alexandria* [(1951) 341 U.S. 622], is more relevant and rebuts Star Tribune's argument. There, we upheld an ordinance prohibiting door-to-door solicitation, even though it applied to prevent the door-to-door sale of subscriptions to magazines, an activity covered by the First Amendment. Although *Martin v. Struthers* [(1943) 319 U.S. 141], had struck down a similar ordinance as applied to the distribution of free religious literature, the *Breard* Court explained that case as emphasizing that the information distributed was religious in nature and that the distribution was noncommercial. [Citation.] As the dissent in *Breard* recognized, the majority opinion substantially undercut both *Martin* and the

(Continued on next page)

are not immune from ordinary forms of taxation for the support of the government. (*Grosjean v. American Press Co.* (1936) 297 U.S. 233, 250.)

Swaggart then proceeded to limit the decisions in *Murdock* and *Follett* by holding that the rule that the free exercise clause prevents the imposition of tax on religious materials applies only in situations where a flat license tax operates as a prior restraint on the free exercise of religious beliefs. (*Jimmy Swaggart Ministries v. Bd. of Equalization, supra,* 110 S.Ct. at p. 695.) The court found that there was no violation of the free exercise clause in the case before it because: (1) California's sales and use tax was case not a flat tax, represented only a small fraction of any retail sale and applied neutrally to all retail sales of tangible personal property made in California; (2) there was no prior restraint of speech since the fee was not charged for registration, was due regardless of registration, and was not imposed as a precondition of registration; (3) the burden imposed by the

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cases now relied upon by Star Tribune, in which the Court had invalidated ordinances imposing a flat license tax on the sale of religious literature. See 341 U.S., at 649-650 (Black, J., dissenting) ('Since this decision cannot be reconciled with the *Jones, Murdock* and *Martin v. Struthers* cases, it seems to me that good judicial practice calls for their forthright overruling'). Whatever the value of those cases as authority after *Breard*, we think them distinguishable from a generally applicable sales tax. In each of those cases, the local government imposed a flat tax, unrelated to the receipts or income of the speaker or to the expenses of administering a valid regulatory scheme, as a condition of the right to speak. By imposing the tax as a *condition* of engaging in protected activity, the defendants in those cases imposed a form of prior restraint on speech, rendering the tax highly susceptible to constitutional challenge. [Citations.] In that regard, the cases cited by Star Tribune do not resemble a generally applicable sales tax. Indeed, our cases have consistently recognized that nondiscriminatory taxes on the receipts or income of newspapers would be permissible, [citations]."

generally applicable sales tax was not constitutionally significant; and (4) the religious organization made no claim that its sincere religious beliefs were violated by paying the taxes. (*Id.* at pp. 695-697.)

Applying the factors identified in *Swaggart* to this case there has been no violation of the free exercise clause. The sales and use tax was not imposed on the right to disseminate religious beliefs or ideas, instead, the tax was imposed on the privilege of storing, using or other consumption of tangible personal property in California. Both the United States and the California Supreme Courts have determined that a California [sic] may constitutionally tax the storage, use or other consumption of tangible personal property regardless of the motivation for the sale or purchase. (*Id.* at p. 696.) "It has never been supposed that the property used in the exercise of the rights of freedom of press or religion is not subject to a uniform tax for revenue imposed upon all alike." (*Watchtower B. & T. Soc. v. County of L.A.* (1947) 30 Cal.2d 426, 430.) In *Watchtower,* the defendant, County of Los Angeles imposed a general ad valorem personal property tax on religious pamphlets and books which the plaintiff, Jehovah's Witnesses, had stored in a building. (*Id.* at p. 429.) The California Supreme Court upheld the tax against a First Amendment challenge on the grounds that the tax was levied solely of the purpose of revenue to defray the general expenses of government and not a regulation aimed at restricting the exercise of religion. (*Ibid; Wallace Berrie & Co.. v. State Bd. of Equalization* (1985) 40 Cal.3d 60, 66.) There is nothing in the record to show that the tax in this case is applied any differently than the tax imposed in *Swaggart* and in *Watchtower.*

Plaintiffs raise four arguments which warrant discussion. First, they claim that the tax applies only to voluntary donations generated in conjunction with the dissemination of religious literature. The argument is unpersuasive because it is factually incorrect and inconsistent with plaintiffs' statement in their opening brief that the tax is not

imposed at the retail sale or public contact level, rather, it is imposed at the retail sale-publishing and "wholesale" distribution levels. Moreover, the Board specifically found that the distribution of the pamphlets to the public by the devotees were gifts. Furthermore, the tax is imposed on the secular process of publishing and distribution by sale of tangible personal property. It is not imposed directly on the Sankirten [sic] practice. The Board of Equalization treats the secular process of publishing materials by an out of state vendor and subsequent transfer by sale for use in California by a bookstore the same as it would treat the process in California by any religious organization. They would both be subject to use tax regardless of the motivation of the parties for the sale or purchase.[9]

Second, the normal concerns that a flat license tax raises because it would operate as a precondition on the exercise of a religious belief is not present in this case. The tax is not a prior restraint since neither the out-of-state retailers nor the plaintiffs are required to pay a fee to register. The tax is not imposed as a precondition for disseminating the material. The tax, in this case, like the tax in *Swaggart*, is more akin to income and property taxes which were held to be permissible in *Murdock* and *Follett*. As the United States Supreme Court held, "When the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency." (*Minneapolis Star v.*

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[9] Plaintiffs' analogy to taxing the collection plate is misplaced. The tax in this case is not based on the donations by the public for the pamphlets but is assessed for the purchases of the published pamphlets made from an out-of-state vendor and by the other California Krishna temples for use in California. Such transactions by more traditional religious groups would be taxable.

Minnesota Comm'r of Rev., supra, 460 U.S. at 585.) There is no danger that Sankirten [sic] has been singled out for special treatment. (*Jimmy Swaggart Ministries v. Bd. of Equalization, supra,* 110 S.Ct. at p. 696.)

Third, plaintiffs assert that the tax unconstitutionally burdens the exercise of their religion because they will have less money to spend on the dissemination of the information which is a practice required by their religion. However, this argument was rejected in Swaggart where the court determined that "to the extent that imposition of a generally applicable tax merely decreases the amount of money [a plaintiff] has to spend on its religious activities, any such burden is not constitutionally significant." (*Id.* at p. 696; *Hernandez v. Commissioner of Internal Revenue* (1989) 490 U.S.___, 109 S.Ct. 2136;[10] *Texas Monthly, Inc. v. Bullock, supra,* 109 S.Ct. at pp. 904-905; *Bob Jones University v. United States* (1983) 461 U.S. 574, 603-604.)

Fourth, although plaintiffs argued in their letter briefs that *Swaggart* was distinguishable on the basis that the Swaggart organization had never contended that the sale of religious materials was conducted to further a core belief or practice of their religion, plaintiffs have never argued that the *payment* of the tax violates their religious beliefs or practices. (*Jimmy Swaggart Ministries v. Bd. of Equalization, supra,* 110 S.Ct. at p. 697; *Hobbie v. Unemployment Appeals Comm'n of Fla.* (1987) 480 U.S. 136, 141.) Furthermore, the purported distinction argued by plaintiffs is invalid since the plaintiff in *Swaggart* believed that it was required to spread the infor-

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[10] In *Hernandez,* Scientologists were required to participate in processes called "auditing" and "training" as part of their religious practices. (*Hernandez v. Commissioner of Internal Revenue, supra,* 109 S.Ct. at p. 2141.) The court upheld the Internal Revenue Service's disallowance of deductions for the church's members even though it was an essential part of the practice of their religion. (*Id.* at p. 2141-2145.)

mation as widely as possible. (*Jimmy Swaggart Ministries v. Bd. of Equalization, supra,* 110 S.Ct. at 691, 697,) In both cases, the plaintiffs premised their arguments on the grounds that the tax interferes with their religious activities. Plaintiffs have like the *Swaggart* plaintiff never argued that the simple act of paying the tax, by itself violates its sincere religious beliefs. (*Id.* at p. 697.) There has been no constitutionally significant burden on the plaintiffs' beliefs or practices based upon the imposition and collection of the sales and use tax in this case.[11] Plaintiffs sincerely presented argument that

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[11] Plaintiffs argue that the state is required to show a compelling state interest before it may interfere with the free exercise of religion. In *Hernandez,* the United States Supreme Court held that where the government placed any substantial burden on religiously motivated activities, the government was required to show a compelling state interest to justify the burden. (*Hernandez v. Commissioner of Internal Revenue, supra,* 109 S.Ct. at p. 2148.) Because we conclude that there has been no constitutionally significant burden placed on plaintiffs exercise of their beliefs or practices there is no need to apply the analysis urged by plaintiffs. In any event, the viability of the compelling state interest test in this area is questionable since the United States Supreme Court's plurality opinion in *Employment Division, Department of Human Resources of Oregon, et al. v. Smith, et al* (1990) ___U.S___, 110 S.Ct. 1595, 1602-1605 (plurality opinion). The court, citing *Hernandez* and a line of cases following the balancing test as set forth in *Sherbert v. Verner* (1963) 374 U.S. 398, 403, held that two Native Americans' claim for a religious exemption from an Oregon law prohibiting the use of peyote as a controlled substance did not require a compelling state interest analysis. (*Ibid.*) The court stated that the test would not be applied to require an exemption from a generally applicable criminal law and noted that the *Sherbert* test had been developed in the unemployment compensation field which "lent itself to individualized governmental assessment of the reasons for the relevant conduct." The court also noted that it had never invalidated any governmental action on the basis of the *Sherbert* test except in the context of unemployment compensation issues. (*Ibid.*)

the imposition of these taxes can lead to their extinction is not supported by any credible evidence.

c. Establishment Clause

Plaintiffs also contend that the application of the sales and use tax to them violates the establishment clauses of the state and federal Constitutions. Plaintiffs claim that the taxes inhibit the practice of Krishna Consciousness because the religion requires its members to engage in the distribution of religious materials and advances or establishes religions that rely primarily upon other forms of religious expression such as sermons delivered from a pulpit or media broadcasting. Since the sales and use taxes single out religious organizations such as plaintiffs, they argue, the taxes in question constitute an unconstitutional respect for other more traditional religious sects. Where there is no facial differentiation among religions in a statute (*Larson v. Valente* (1982) 456 U.S. 228, 246-247), the court must apply the three-pronged Establishment Clause inquiry of *Lemon v. Kurtzman, supra,* 403 U.S. at pp. 612-613. (*Hernandez v. Commissioner of Internal Revenue, supra,* 109 S.Ct. at p. 2147.) Under the *Lemon* test in order for a statute or practice to be permissible: (1) it must have a secular purpose; (2) it must neither advance nor inhibit religion in its principal and primary effect; (3) it must not foster " 'an excessive government entanglement with religion.' " (*Lemon v. Kurtzman, supra,* 403 U.S.. at pp. 612-613.) The plaintiffs concede in their opening brief that there is nothing in the record to suggest that the Board harbored a non-secular purpose in applying the sales and use tax to plaintiffs. However, they argue that the second and third parts of the *Lemon* test are violated by the statutory scheme in this case which renders it unconstitutional.

a. Principal or Primary Effect

Plaintiffs claim that the primary effect of the tax is to discriminate against religions that require its members to distribute literature and favors or establishes religions that utilize "more orthodox forms of proselytization." The government is precluded from conveying " 'a message that religion or a particular religious belief is *favored* or preferred.' " (*County of Allegheny v. American Civil Liberties U.* (1989) ___U.S.___, 109 S.Ct. 3086, 3101, emphasis in original.) The primary effect of the tax in this case is not the advancement nor inhibition of certain types of religion, but is to raise revenue. (*Lynch v. Donnelly* (1984) 465 U.S. 668, 681-682.) In *Lynch*, the court held that the primary effect where a city included a creche or nativity scene in its annual Christmas display was not to advance the Christian religion.[12] There is no substantial aid to what plaintiffs term "more orthodox" religions. The fact that the state does not impose a tax on "pulpit preaching" for example does not

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[12] Other cases discussed in *Lynch* where the court held that there was no establishment clause violation included situations involving the expenditure of large sums of public funds to supply textbooks to church-sponsored schools (*Board of Education v. Allen* (1968) 392 U.S. 236; 248; expenditure of public funds for transporting students to church-sponsored schools (*Everson v. Board of Education* (1947) 330 U.S. 1, 17); federal grants for college buildings of church-sponsored institutions which combine secular with religious education (*Tilton v. Richardson* (1971) 403 U.S. 672, 688); non-categorical grants to church-sponsored colleges and universities (*Roemer v. Maryland of Public Works Bd.* (1976) 426 U.S. 736, 765-767); tax exemptions for church properties (*Walz v. Tax Commission* (1970) 397 U.S. 664, 672-680); legislative prayers (*Marsh v. Chambers* (1983) 463 U.S. 783, 792-795); release time programs for religious training (*Zorach v. Clauson* (1952) 343 U.S. 306, 313-315; and Sunday closing laws (*McGowan v. Maryland* (1961) 366 U.S. 420, 443-445).

render the taxes in the present case unconstitutional. " '[N]ot every law that confers an "indirect," "remote" or "incidental" benefit upon [religion] is, for that reason alone, constitutionally invalid.' " (*Lynch v. Donnelly, supra,* 465 U..S. at p. 683; *Committee for Public Education & Religious Liberty v. Nyquist* (1973) 413 U.S. 756, 771.) Furthermore, "[a] law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose." (*Corporation of Presiding Bishop v. Amos* (1987) 483 U.S. 327, 107 S. Ct. 2862, 2868-2869.) No credible evidence has been presented which indicates that more orthodox religious sects will receive any benefit from the taxes under review in this case or the collection of those taxes from plaintiffs. There is no factual basis for concluding that religious groups that practice "pulpit preaching" or media evangelizing will receive indirect, remote and incidental benefits from plaintiffs paying sales or use taxes. Since the primary effect of the statute in this case is secular and does not even "coincide or harmonize with the tenets of some or all religions," there is no violation of the establishment clause. (*McGowan v. Maryland, supra,* 366 U.S. at p. 442.)

b. Entanglement

Plaintiffs claim that the application of the taxation statutes to their religious practices will result in ongoing administrative investigation and regulation of their financial affairs. They argue that the administrative burdens subjected on them by the code's requirements and the forcible disclosure of sensitive financial affairs. Further, plaintiffs point to the "chilling" effect of the various powers granted to defendant in enforcement of payment of delinquent taxes and the potential for intrusion.

In *Swaggart,* the United States Supreme Court dealt with the issue of whether California's sales and use taxes interfered with the establishment clause under the entanglement test. The court concluded that the imposition of

those taxes did not threaten any excessive entanglement between church and state. (*Jimmy Swaggart Ministries v. Bd. of Equalization, supra,* 110 S.Ct. at p. 698.) The court noted that: the evidence of administrative entanglement in the case was thin because the record showed that the plaintiffs had a sophisticated accounting staff; the financial burden of collecting and remitting the taxes would have to be "far more invasive than the level of contact created by the administration of neutral tax laws" (*id.* at p. 699) and the imposition of the tax does not require the state to inquire into the religious content of the items sold or the religious motivation for selling them since the tax is due without regard to content or motive. *(Ibid.)*

Similarly, in this case, plaintiffs cannot point to any actual state action which would impede the practice of their religion. Plaintiffs have an accounting system by which they track the number of books and pamphlets distributed to the various temples. Plaintiffs also assign an arbitrary value to each of the books and pamphlets for their own internal purposes. No facts were shown that there had been or would be any governmental surveillance of plaintiffs' activities in order to impose the tax. Any administrative burdens created by the imposition of these neutral tax laws do not involve the invasive levels of contact which would require them to be invalidated. Furthermore, the imposition of the tax like the tax in *Swaggart* does not require the state to inquire into the content of the materials or the motives for transfer since the tax is due regardless of the content or motive. *(Ibid.)* Since there has been no excessive entanglement of religion and government by imposing the sales and use tax in this case, there is no violation of the establishment clause.

3. The State Constitution

Article 1, section 4 of the California Constitution provides: Free exercise and enjoyment of religion without dis-

crimination or preference are guaranteed. . . . The Legislature shall make no law respecting an establishment of religion." Plaintiffs argue that the provisions of article I, section 4 of the California Constitution are to be more broadly construed than the provisions of the First Amendment. No doubt, there is authority for this proposition. (*Fox v. City of Los Angeles* (1978) 22 Cal.3d 792, 796-799; *Feminist Women's Health Center v. Philibosian* (1984) 157 Cal.App.3d 1076, 1091-1092.) However, no sound justification has been presented to extend the protections of article I, section 4 to the facts in this case where a neutral tax is imposed on book transactions of this nature.

In *Watchtower B. & T. Soc. v. County of Los Angeles, supra,* 30 Cal.2d at pp. 430-432, the California Supreme Court held that the Watchtower Bible and Tract Society could constitutionally be taxed for storing religious tracts in a warehouse. The court specifically held that the imposition of a neutral tax on the storage of religious materials did not violate article I, section 4 of the California Constitution. The court noted: "As we have seen the tax here involved is not such a burden on the exercise of religion as to render it invalid. It is not of the character heretofore denounced by the Supreme Court of the United States. While the power to tax may involve the power to destroy it is clear that no such result will be accomplished by the tax here imposed. The property here involved is required to bear only its share of the burden of the maintenance of the government which is for its protection equally and with other property in Los Angeles County. (Id. at p. 432.) The very liberty invoked is made realistic by the protection afforded by that government." This court is bound by our Supreme Court's interpretation of article I, section 4 of the California Constitution.

Plaintiffs cite *Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1117-1119 and *People v. Woody* (1964) 61 Cal.2d 716, 718-728 as authority for the proposition that the Board of Equalization must demonstrate a compelling state interest in

order to impose the use and sales taxes on them. These cases are not applicable. First, in both *Molko* and *Woody*, in interpreting the scope of the religious liberty provisions of the state constitution, the court relied on each occasion on United States Supreme Court freedom of religion cases exclusively in evaluating the scope of article I, section 4. As noted previously, the United States Supreme Court has upheld the very taxes at issue in this case in *Swaggart*. Therefore, if the California Supreme Court were to continue to rely exclusively on federal authority in defining religious liberty rights in the tax context, then federal authority such as *Swaggart* would inexorably lead to the conclusion that the taxes in this case are not violative of the state constitution.

More critically, both *Molko* and *Woody* hold that before the compelling state interest test is even applied, a court must first find that a burden has been imposed upon the free exercise of religion. (*Molko v. Holy Spirit Assn., supra*, 46 Cal.3d at p. 1117; *People v. Woody, supra*, 61 Cal.2d at pp. 721-722.) We have previously concluded that the neutral tax in the instant case does not constitute a burden on plaintiffs' followers' exercise of religious rights. Since there is no burden on plaintiff's free exercise rights, there is no requirement that this court find a compelling state interest in order to uphold the taxing statutes. Most importantly, *Molko* and *Woody* involve far different facts than those present in the instant case. In *Molko*, the issue involved fraudulent recruiting practices and in *Woody* the question before the court related to an absolute prohibition against the use of peyote. Unlike and [sic] *Molko* and *Woody*, the issues in *Watchtower B. & T. Soc. v. County of L.A., supra*, 30 Cal.2d at pp. 426-432, are very similar to those in the case at bar. *Watchtower* is the applicable state constitutional authority and it unequivocally supports the position taken by the trial court. There is no merit to the contention that the taxes in the present case violate provisions of the California Constitution.

DISPOSITION

The judgment is affirmed. Defendant is to recover its costs on appeal.

NOT TO BE PUBLISHED

TURNER, J.

We concur:

LUCAS, P.J.

BOREN, J.